

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

11 ORACLE AMERICA, INC.,
12
13 v.
14 GOOGLE INC..

Plaintiff,
Defendant.

Case No. 3:10-cv-03561-WHA

**[PROPOSED] ORDER RE RULE 706
EXPERTS**

Judge: Hon. William H. Alsup

Date Comp. Filed: October 27, 2010

Trial Date: October 31, 2011

1 By an order dated August 30, 2001 this Court appointed Dr. James R. Kearl, pursuant to
 2 Rule 706 of the Federal Rules of Evidence, to serve as an independent expert to the Court on the
 3 subject of damages claimed by the parties in this action. Mr. John L. Cooper of Farella, Braun +
 4 Martel LLP was appointed to serve as counsel to Dr. Kearl on a pro bono basis. The purpose of
 5 Dr. Kearl's appointment is provide an independent professional analysis and view to assist the
 6 Court and the jury, in the event liability is found, in evaluating and assessing damages pursuant
 7 to the claims asserted in this action. Dr. Kearl is to use his professional judgment to determine
 8 the magnitude of work required to meet the purpose of this appointment. Dr. Kearl's assignment
 9 shall include, but not be limited to, the following:

10 1. Review of all materials necessary in order for Dr. Kearl to be personally and
 11 thoroughly informed as to all aspects of damage claims of the parties in this action. Dr. Kearl
 12 may use assistants in conducting his work which assistants shall be compensated as provided in
 13 paragraph 9 of this Order. To the extent they have not already done so, Mr. Cooper, Dr. Kearl,
 14 and any of Dr. Kearl's staff who will have access to confidential material of either party will sign
 15 the undertaking required under the Protective Order in this case regarding access to and review
 16 of confidential and highly confidential material. Mr. Cooper will assist Dr. Kearl in obtaining
 17 from counsel for the parties the material Dr. Kearl seeks to review. The full non privileged
 18 record in this matter shall be available to Dr. Kearl as he requests.

19 2. The parties have already provided to Mr. Cooper the expert damages report
 20 submitted by Dr. Iain M. Cockburn in May 2011, the parties' briefing on Google's Daubert
 21 motion regarding that report, and the order of this court dated July 22, 2011 resolving that
 22 motion. The parties shall immediately produce to Mr. Cooper the following materials to be
 23 conveyed to Dr. Kearl: a) a list of all depositions taken in this matter, including notices of all
 24 Rule 30(b)(6) depositions and the identity of the responding witnesses; b) a description by
 25 category of all documents produced by each party; c) copies of all substantive motions filed by
 26 the parties; d) copies of all documents filed in conjunction with any Markman hearings; e) copies
 27 of all expert reports filed in this matter; f) copies of all answers to interrogatories submitted by
 28 the parties; and g) copies of all responses to requests for admissions submitted by the parties.

1 3. Review each party's expert reports and all supporting materials submitted by each
 2 party's damages expert. When the parties serve expert reports on the other party they shall serve
 3 copies of those reports and all supporting materials on Mr. Cooper to be conveyed to Dr. Kearl.
 4 The parties shall make available to Dr. Kearl through Mr. Cooper the full record of materials on
 5 which their experts relied in preparing their reports and testimony.

6 4. Within a reasonable period of time after Dr. Kearl has received all reports of
 7 damages experts to be submitted by the parties, Dr. Kearl shall prepare and submit his separate
 8 expert report which will independently a) critique the damages expert reports submitted by each
 9 side, b) provide his own independent view of each issue raised or presented in the damages
 10 expert reports of the parties, and c) address each additional issue he believes should be evaluated
 11 in order to provide the jury with a complete and independent view of damages in this case. Mr.
 12 Cooper will be available to provide whatever assistance Dr. Kearl needs to obtain information
 13 and prepare his report.

14 5. The parties have the right to conduct discovery of Dr. Kearl to the same extent
 15 provided as to any other expert witness. Dr. Kearl may be deposed by the parties within a
 16 reasonable time following submission of his report. Mr. Cooper shall participate in such
 17 deposition to represent the interests of Dr. Kearl. Communication between Mr. Cooper and
 18 Dr. Kearl shall be privileged to the extent provided by Rule 26 of the Federal Rules of Civil
 19 Procedure. Oracle and Google, collectively, shall have no fewer than 7 hours to question
 20 Dr. Kearl, with the precise amount of time to be determined after the parties have the opportunity
 21 to review the scope of Dr. Kearl's expert report. Oracle and Google shall divide the allotted time
 22 equally. Mr. Cooper shall also have the opportunity to question Dr. Kearl at deposition.
 23 Following the completion of the deposition, Mr. Cooper shall submit the transcript of the
 24 deposition to the Court and the Court may direct additional questions to Dr. Kearl. Following
 25 the Court's questioning, the parties shall have the opportunity to direct follow up questions to
 26 Dr. Kearl within the scope of any questions asked by the Court.

27 6. Dr. Kearl shall be permitted to attend the depositions of the parties' damages
 28 experts in this matter, and Dr. Kearl's counsel shall be permitted to question the parties' damages

1 experts at those depositions. The parties will meet and confer and seek the Court's guidance
 2 regarding the process, if any, by which Dr. Kearl, through Mr. Cooper, may submit proposed
 3 questions to the Court to be posed to the parties' experts at trial.

4 7. While Dr. Kearl is not to function as a mediator, the Court is interested in full
 5 disclosure and understanding by Dr. Kearl of all issues relating to damages in this action. In
 6 serving that interest, the parties are directed to agree to a procedure by which Dr. Kearl can
 7 communicate with each of the parties' expert witnesses in an informal off-the-record manner to
 8 address any ambiguities he may wish to have thus clarified. Such informal communications
 9 shall not be subject to discovery or admissible in court, and shall be solely between the experts.

10 8. Dr. Kearl will testify at trial subject to the provisions of Rule 26 of the Federal
 11 Rules of Civil Procedure. The parties will meet and confer and seek the Court's guidance
 12 regarding how Dr. Kearl's role at trial will be described to the jury. Dr. Kearl will be presented
 13 in direct examination at trial by Mr. Cooper. Each party will be permitted to cross examine Dr.
 14 Kearl as though he were an adverse expert witness. The Court will direct questions to Dr. Kearl
 15 as it deems appropriate.

16 9. Dr. Kearl shall be compensated on a monthly basis. His professional fees and
 17 expenses shall be paid to Mr. Cooper, one half by each party within in thirty days of receipt of
 18 each of his monthly invoices. Dr. Kearl shall submit his invoices and supporting materials,
 19 which shall include the invoices and supporting material of those persons assisting him,
 20 including the number of hours worked, the work performed, and the type of expenses incurred, to
 21 Mr. Cooper who will forward them to counsel for the parties for payment in accordance with this
 22 order. The parties may contact Mr. Cooper to seek to negotiate reductions in Dr. Kearl's billing
 23 as they deem necessary or appropriate.

24 10. Neither Dr. Kearl nor any of his assistants shall communicate directly with the
 25 parties or with the Court. All communication Dr. Kearl has with the parties and the Court shall
 26 be conducted through Mr. Cooper. The communication provided in paragraph 7 of this order
 27 shall not be between the parties but shall be professional communication between the experts
 28 which is conducted off-the-record.

1 11. Neither Dr. Kearn nor any of his assistants shall incur any liability to the parties as
2 a result of their work on this matter.

3 IT IS SO ORDERED.

4

5 Dated:

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7

8 HON. WILLIAM ALSUP
9 UNITED STATES DISTRICT JUDGE

10 /s/ Daniel Purcell

11 Filer's Attestation: Pursuant to General Order
12 NO. 45, Section X.B. regarding non-filing
13 signatories, Daniel Purcell hereby attests that he has
14 obtained concurrence from counsel for Oracle
15 Corporation and Dr. James Kearn in the filing of this
16 proposed order.____.